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Attorneys for Defendants Lawrence Ira Prozan  
 dba Prozan Financial Services and Multi-Financial Securities Corp.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

REGINA JIMENEZ,  
 Plaintiff,

vs.

NATIONAL ASSOCIATION OF  
 SECURITIES DEALERS; LAWRENCE IRA  
 PROZAN, DBA PROZAN FINANCIAL  
 SERVICES; and MULTI-FINANCIAL  
 SECURITIES CORP.,  
 Defendants.

Case No. 3:07-cv-03360-MJJ

**REPLY IN SUPPORT OF THE  
 PROZAN DEFENDANTS' MOTION  
 TO DISMISS SECOND AMENDED  
 COMPLAINT AND MOTION TO  
 VACATE THE ARBITRATION  
 AWARD**

Hearing Date: August 8, 2008  
 Time: 9:00 a.m.  
 Courtroom: 17  
 Judge: Hon. Jeffrey S. White

Plaintiff Jimenez's Opposition fails to substantively address any of the arguments contained in the Motion to Dismiss filed by the Prozan Defendants (Lawrence Ira Prozan DBA Prozan Financial Services, and Multi-Financial Securities Corp.). Moreover, the Opposition does not cite to, nor present, any evidence. Instead, the Opposition seeks permission to conduct extensive discovery, and leave to file a third Amended Complaint. Jimenez's Second Amended Complaint is insufficient to vacate the arbitration Award and allow her to re-litigate her claims. The Motion to Dismiss explains that dismissal of the Second Amended Complaint, without leave to amend, is proper because this Court lacks subject matter jurisdiction, and/or it fails to state a claim upon which relief may be granted. In the alternative, should this Court determine it

1 has subject matter jurisdiction and that it will consider Jimenez's defective Motion to Vacate the  
 2 arbitration Award, confirmation of the Award is required because the narrow grounds necessary  
 3 to vacate an Award are not properly plead, nor present.<sup>1</sup>

4 **I.**

5 **PLAINTIFF HAS FAILED TO ESTABLISH SUBJECT MATTER**  
 6 **JURISDICTION AND HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF**  
 7 **CAN BE GRANTED**

8 Jimenez has not alleged facts sufficient to state a claim against the Prozan Defendants  
 9 under the Securities and Exchange Act – despite having *two* prior attempts to do so. The  
 10 Opposition asks for “discovery rights to ascertain facts in more detail and asks for leave to  
 11 amend her pleading to state facts in more detail.” [Opposition (“Opp.”), p. 1]. This is  
 12 tantamount to an admission that the Second Amended Complaint (“SAC”) fails to state  
 13 sufficient facts to support a claim. The pleading hurdle “serves to prevent costly discovery on  
 14 claims with no underlying factual or legal basis.” Migdal v. Rowe Price-Fleming Int’l, Inc. 248  
 15 F.3d 321, 323 (4th Cir. 2001) (“plaintiffs cannot simply promise the court that once they have  
 16 competed discovery, something will turn up.”). Jimenez’s pleading defect is fatal – and thus the  
 17 granting of the Motion to Dismiss pursuant to Rule 12(b)(6) is proper.

18 The Opposition does not illustrate that Jimenez has satisfied her pleading burden  
 19 because it is impossible for it to do so. Instead, the Opposition states that under 15 U.S.C. § 78  
 20 u-2 there is a basis for “civil remedies in administrative proceedings.” [Opp., p. 2.] This  
 21 statement is irrelevant to the instant matter because neither the underlying arbitration, nor this  
 22 proceeding, is an administrative proceeding.

23 Jimenez also seeks to establish federal jurisdiction by pleading a federal claim, but the  
 24 SAC does not contain any of the facts necessary to properly plead controlling person liability  
 25 under the 15 U.S.C. § 78t (“Section 20” of the Securities and Exchange Act.). Section 20  
 26

27 <sup>1</sup> Such alternative motions are not improper, but are expressly allowed and encouraged to be asserted  
 28 simultaneously for efficiency. Federal Rule of Civil Procedure 12(g).

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1 provides that, under certain circumstances, a “controlling person” is vicariously liable for the  
 2 wrongdoing of the primary wrongdoer, the “controlled person.” However, the SAC does not  
 3 include the minimal allegations identifying the controlled and controlling persons, or what  
 4 specific provision of the federal securities laws the controlled person is alleged to have violated.

5 The SAC and the Opposition both state:

6 “§78t describes liability of controlling persons and persons who  
 7 aid and abet violations [of rules and regulations.]. Plaintiff asserts  
 8 in 2AC that defendants violated the rules and regulations not only  
 9 as to how they handled plaintiff’s finances and investments, but  
 10 also by the manner in which they manipulated and corrupted the  
 11 NASD arbitration process and concealed the fact that Prozan’s  
 12 wife was a high official and a “controlling” official in the NASD.”  
 13 [SAC p.12, Opp., p. 2.]

14 Section 20 states, in pertinent part, that:

15 Every person who \* \* \* controls any person liable under any  
 16 provision of this title \* \* \* shall also be liable jointly and severally  
 17 with and to the same extent as such controlled person to any  
 18 person to whom such controlled person is liable, unless the  
 19 controlling person acted in good faith and did not directly or  
 20 indirectly induce the act or acts constituting the violation or cause  
 21 of action. Section 20(a) of the Securities and Exchange Act of  
 22 1934.

23 Jimenez’s incoherent allegation seems to be that *Prozan’s wife* is a controlling person  
 24 and thus liable to Jimenez – but this can not serve as the basis of liability of the Prozan  
 25 Defendants as she is *not* one of the Prozan Defendants, nor a named defendant in this action.  
 26 Perhaps it was Jimenez’s intention to allege that the Prozan Defendants are the controlling  
 27 persons liable to her under Section 20 because they controlled the NASD, i.e. the Prozan  
 28 Defendants “manipulated and corrupted the NASD arbitration process” and concealed facts –

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1 however, this too is insufficient to state a claim. Even if the Prozan Defendants had concealed  
 2 the fact Prozan's wife was a "high official and a controlling official in the NASD" – which is  
 3 untrue<sup>2</sup> – that allegation is insufficient to state a claim because the Prozan Defendants had no  
 4 duty to make such disclosure. Neither the SAC, nor the Opposition, allege that the Prozan  
 5 Defendants owed Jimenez any such duty.

6 Section 20 holds that the controlling persons *are liable with, and to the same extent, as*  
 7 *the controlled person.* To the extent Jimenez's pleading could be construed as containing an  
 8 allegation that the controlled person is the NASD, and thus the Prozan Defendants are the  
 9 controlling persons who are liable with, and to the same extent, as the NASD - this too is  
 10 insufficient to state a claim. The NASD is not, and can not possibly be, liable to Jimenez to any  
 11 extent because this Court dismissed Jimenez's claims against it pursuant to the doctrine of  
 12 arbitral immunity. Moreover, well-settled case law holds that Section 20 liability does not apply  
 13 to SROs (self-regulatory organizations) like the NASD. Carr v. New York Stock Exchange Inc.  
 14 414 F.Supp. 1292 (N.D. Cal. 1976). Given that Section 20 holds that the controlling person is  
 15 only liable to the extent of the controlled person, and there is no viable allegation pled against  
 16 any "controlled person," Jimenez has once again failed to state a claim against the Prozan  
 17 Defendants under the Securities and Exchange Act. Even if Jimenez had properly pled a claim  
 18 under the federal securities laws, it is most likely time barred, as the conduct at issue occurred in  
 19 the years 2000-2003 and suitability/ fraud claims under 10(b) and 10(b)(5) must be commenced  
 20

21  
 22 <sup>2</sup> As the NASD (now FINRA) stated in its Motion to Dismiss which resulted in its dismissal from this action, with  
 23 prejudice. "Ms. Drucker [Prozan's wife], is not a FINRA 'official,' but is a member of FINRA's National  
 24 Arbitration and Mediation Committee ("NAMC"). The NAMC is an advisory committee, comprised of  
 25 representatives of the public at large, members of the securities arbitration plaintiff and defense bar, representatives  
 26 of broker-dealers, and FINRA arbitrators and mediators. The NAMC advises the FINRA Dispute Regulation Board  
 27 on significant policy decisions, including evaluation of existing arbitration and mediation rules, recommendations  
 28 for changes in those rules, and recommendations regarding recruitment, qualification, training and evaluation of  
 neutrals. The NAMC's advise and counsel is highly valued by FINRA, but it has no authority whatsoever with  
 respect to specific arbitrators or arbitrations. Moreover, the NAMC's membership is so broad and varied that, if  
 Plaintiff's [Jimenez's] position were accepted, many arbitrations would be subject to vacature as parties, lawyers,  
 arbitrators and mediators are all represented on the NAMC. Such a result is neither contemplated, merited nor  
 justified." [FINRA's Motion to Dismiss, p. 3, fnt 5.] Despite ample and repeated opportunity, Jimenez has never  
 presented any authority, nor evidence, to refute the foregoing facts.

1 with one year after discovery of the facts constituting the violation. Lampf, Preva Lipkind et. al.  
 2 v. Gilbertson, 111 S.Ct. 2773, 501 U.S. 350 (1991).

## 3 II.

### 4 JIMENEZ HAS NOT FILED A PROPER MOTION TO VACATE AND IS NOT 5 ENTITLED TO RELITIGATE HER ARBITRATION CLAIM

6 The law does not allow Jimenez to re-litigate the claims which were presented, or which  
 7 could have been presented, to the NASD arbitrators – yet that is precisely what she is attempting  
 8 to do. The Opposition states “[T]he defendants assert that JIMENEZ cannot relitigate claims  
 9 decided in arbitration, again denying any right to judicial review.” What Jimenez continues to  
 10 ignore is that judicial review of arbitration awards is only permitted upon submission of a timely  
 11 and procedurally proper Motion to Vacate (“MTV”), which sets forth the very limited, specific  
 12 grounds for vacature, as well as evidence of the facts supporting such grounds. Thus, Jimenez’s  
 13 unsupported allegations are insufficient. “The burden is on plaintiff for vacation of an  
 14 arbitration award due to evident partiality is ‘heavy’, and the plaintiff must establish by specific  
 15 facts that indicate improper motives on the part of an arbitrator.” Giannelli Money Purchase  
 16 Plan & Trust v. ADM Investor Servs., Inc. 146 F.3d 1309, 1212 (11th Cir 1998) (citations  
 17 omitted).

18 There is no proper MTV pending before this Court. This fact is nearly admitted in the  
 19 Opposition when it states “Plaintiff [Jimenez] would like to file a Motion to Vacate but only if  
 20 given leave by the Court to do so and preferably after discovery is done.” Jimenez is not  
 21 entitled to discovery, nor is she entitled to leave to file a proper MTV as her time to do so have  
 22 expired. The pleading Jimenez refers to as her MTV is titled “Second Amended Complaint,”  
 23 and was not a noticed motion. It does not comply with the Federal Arbitration Act which  
 24 requires Jimenez to bring a noticed motion to vacate, modify or correct an arbitration award. 9  
 25 U.S.C. §12. To the extent the Court may consider the SAC to be a MTV, it is procedurally  
 26 defective, insufficiently pled, and void of the requisite evidentiary support. Most notably, it  
 27 does not support a single one of its factual contentions with affidavits or declarations, and  
 28 appropriate references to the record, as the rules require. [Civil L.R. 7-5(a).] Not surprisingly,

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1 Jimenez's SAC fails to comply with the similar procedural and evidentiary requirements for a  
 2 MTV under California law. See California Code of Civil Procedure §1285.4

3 The only evidence that this Court has been presented is the Award issued in the  
 4 underlying arbitration, and the Declaration of Elizabeth Lowery ("Lowery Decl.") in support of  
 5 the Motion to Dismiss the SAC. (The Court may take judicial notice of the Award, which is  
 6 also authenticated by, and attached to, the Lowery Decl.) Not only did Jimenez fail to satisfy  
 7 the evidentiary burden inherent in filing a MTV, the evidence the Prozan Defendants have  
 8 presented is unrefuted. That unrefuted evidence proves that most, if not all, of the material  
 9 statements the SAC and Opposition proffer as facts are untrue.

10 The Award evidences that, *for over two years*, the Arbitrators carefully and repeatedly  
 11 considered the issues presented to them. The Award confirms that the Arbitrators did consider  
 12 written submissions and hear oral argument on Jimenez's Motion for Reconsideration of the  
 13 Arbitrators' decision to dismiss the arbitration on the grounds that Lawrence I. Prozan's wife  
 14 was a member of the NASD's Arbitration and Mediation Committee. [Award, p. 8.]. This  
 15 directly refutes Jimenez's allegation that "JIMENEZ did not know that Prozan's wife was a high  
 16 official of the NASD at the time of the arbitration; the arbitrators abruptly cancelled the hearing  
 17 and thus deprived her of any chance to challenge or raise issues, etc." [Opp. p. 4:1-4.]<sup>3</sup> During  
 18 that hearing, the Arbitrators not only re-affirmed they had made all legally-required disclosures  
 19 to the parties, but also that none of them knew of, or had any dealings whatsoever with,  
 20 Defendant Prozan's wife. [Lowery Decl., p. 4.] This evidence, like all other evidence presented  
 21 in this matter, is unrefuted. In arbitration, "the parties do not get to appeal an adverse decision."  
 22 Saika v. Gold (1996) 49 Cal.App.4th 1074, 1076. This is precisely what Jimenez is attempting  
 23 to do.

24  
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 27 <sup>3</sup> This same allegation was included in one of Jimenez's early arbitration pleadings, rendering the comment that  
 28 she was unaware of this fact until after the arbitration specious.



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III.

CONCLUSION

Dismissal of Plaintiff Jimenez's claims, *without leave to amend*, is warranted for lack of subject matter jurisdiction, and/or for failure to state a claim. If, in the alternative, this Court determines that subject matter jurisdiction exists, confirmation of the Arbitration Award is warranted, and necessary to give Jimenez and the Prozan Defendants the finality they agreed the Award would provide.

DATED: July 14, 2008

EDGERTON & WEAVER, LLP

By:   
Elizabeth Lowery, Attorney for Defendants  
Lawrence Ira Prozan and Multi-Financial  
Securities Corp.

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**PROOF OF SERVICE**

I am employed in the County of Los Angeles. I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 2615 Pacific Coast Highway, Suite 300, Hermosa Beach, California 90254.

On July 14, 2008, I served the following document described as:

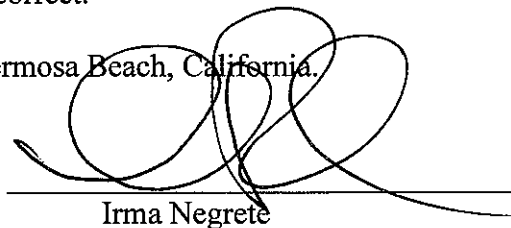
**REPLY IN SUPPORT OF THE PROZAN DEFENDANTS' MOTION TO DISMISS  
SECOND AMENDED COMPLAINT AND MOTION TO VACATE THE  
ARBITRATION AWARD**

on the interested parties in this action by placing the true copies thereof enclosed in sealed envelopes as follows:

**PLEASE SEE ATTACHED SERVICE LIST**

- ☐ **By U.S. Mail:** I deposited such envelopes in the mail at Hermosa Beach, California. The envelopes were mailed with postage thereon fully prepaid.
- ☐ **By Personal Service:** I caused such envelope to be delivered by hand to the individuals at the addresses listed.
- ☐ **By Overnight Courier:** I caused the above-referenced document(s) to be delivered to an overnight courier service (DHL), for delivery to the above addressee(s).
- ☒ **By Electronic Mail:** I caused the above-referenced document(s) to be transmitted to the above-named person at the following email addresses above.
- ☒ **(FEDERAL):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on July 14, 2008, at Hermosa Beach, California.



Irma Negrete



**SERVICE LIST**

**Jimenez v. National Association of Securities Dealers, et al.**  
**Case No. 3:07-cv-03360-MJJ**

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